In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 987

JOHN F. NUTT AND EILEEN M. NUTT, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners were the lessees of several parcels of farm land. On August 30, 1955, they sold the leaseholds along with the mature but unharvested crops growing on them to a corporation, the stock of which was owned by petitioners and their daughter. The sale price totalled $97,856.87, of which $94,656.87 represented the appraised fair market value of the unharvested crop and $3,200 the appraised fair market value of the unexpired leases. Petitioners reported their profit from the sale as long-term capital gain. The Commissioner determined deficiencies which, so far as pertinent here, were premised on the ground that the portion of the sales price attributable to the unharvested crops was taxable as ordinary income

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rather than as capital gain. The Tax Court sustained the Commissioner and the court of appeals affirmed on the basis of its previous decision on the same issue in *Bidart Bros.* v. *United States,* 262 F. 2d 607, certiorari denied, 359 U.S. 1003 (Pet. 1a–5a.)[1]

Absent a statute to the contrary, this Court has held that the proceeds derived from the sale of crops—whether or not sold along with the land and whether or not harvested—are taxable as ordinary income rather than as capital gain. *Watson* v. *Commissioner,* 345 U.S. 544. Congress has changed that result only to the extent set forth in 1954 Code § 1231(b)(4),[2] *i.e.,* a taxpayer is entitled to capital gain treatment on the proceeds received from sale of a crop only if he sells an unharvested crop along with the land on which it is growing and he has held the land for more than 6 months and used it in his trade or business. Of controlling importance for present purposes is the fact that the statute applies only to a sale of "land" with growing crops attached. Here petitioners sold leaseholds. The Treasury Regulations have for many years provided that the statutory word "land" in § 1231(b)(4) does not include a leasehold. See Treasury Regulations

[1] In the lower courts the case also involved a sale of land (as contrasted with leaseholds) with unharvested crops, but the petition for certiorari does not raise any issue with regard to that transaction.

[2] Section 1231(b)(4) provides:

> In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business."

118, § 39.117(j)-1(d); Treasury Regulations on Income Tax (1954 Code), § 1.1231-1(f). During this period Congress reenacted the provision verbatim in the 1954 Code.

Petitioners assert (Pet. 3) that the $3,200 *received for the leasehold* should be accorded capital gain treatment under 1954 Code Section 1231(b)(1). The Commissioner does not quarrel with this contention.[3] The instant case is concerned, however, with the taxation of the $94,600 *received for the growing crop.* This amount could receive capital gain treatment only under § 1231(b)(4), not under § 1231(b)(1). See *Watson* v. *Commissioner,* 345 U.S. 544.

The judgment below is correct, there is no conflict of decisions, and the question is not of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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APRIL 1966.

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[3] In the Tax Court the Commissioner argued that the entire sale was a sham. The Tax Court rejected that contention and held that only the proceeds allocable to the sale of the crops were taxable as ordinary income. Since the Commissioner did not appeal, the Tax Court's decision that the petitioners were entitled to capital gain treatment on the $3,200 received for the leaseholds is now binding.

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PETITIONERS' REPLY BRIEF

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The trial court, in findings of fact which were left undisturbed by the court of appeals, found that: (1) the "agreed consideration for the leaseholds of the land upon which the unharvested crops were growing was $97,856.87";[1] (2) "petitioners assigned these leaseholds";[2] (3) $97,856.87 was "paid" to "petitioners pursuant to the terms of the written agreement for sale of leaseholds";[3] and (4) "of the $97,856.87 considera-

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[1] R. at 208.

[2] R. at 208.

[3] R. at 209.